

1 respect to the Upstream Facilities on an annual basis. The audit
2 shall cover the one-year period ending one hundred eighty (180)
3 days prior to the beginning of the period covered by the next
4 Annual Budget and the Cost Consultant's audit report ("Audit
5 Report") shall be provided to the City, Lockheed Martin and EPA
6 at least one hundred fifty (150) days prior to the beginning of
7 the period covered by the next Annual Budget. The purpose of the
8 audit is to: (1) assist the Cost Consultant in preparing the
9 Annual Budget; and (2) allow the parties to determine whether any
10 unnecessary costs have been incurred.

11 4. Within sixty (60) days of receipt of an annual
12 Audit Report, the City shall reimburse the O&M Trust Account for
13 expenditures found to be unnecessary during the audited period.

14 5. Lockheed Martin, the City and EPA shall each have
15 the right to invoke dispute resolution with respect to any
16 finding in an Audit Report.

17 6. The Cost Consultant shall perform a final audit of
18 the City's request for payments for O&M Activities with respect
19 to the Upstream Facilities within ninety (90) days following
20 EPA's approval of the Certificate of Completion pursuant to
21 Section XV of this Decree. Lockheed and the City shall settle
22 all accounts with the O&M Trust Account within thirty (30) days
23 of the issuance of the Cost Consultant's final Audit Report. At
24 that time, the Cost Consultant shall direct the Trustee and the
25 Trustee shall be required to pay over all remaining funds in the
26 O&M Trust Account, if any, to Lockheed Martin. Lockheed Martin,
27 the City and EPA shall have the right to invoke dispute
28

1 resolution with regard to the final accounting or the final Audit
2 Report.

3 I. The City of Burbank shall utilize a competitive bidding
4 process to secure all services and materials required to perform
5 O&M Activities with respect to the Upstream Facilities that are
6 susceptible to contract. Award of any contract to other than the
7 "lowest responsible bidder" within the meaning of Burbank
8 Municipal Code § 9-122 (Section 54 of the Charter of the City of
9 Burbank, as amended January 14, 1971), shall require a
10 justification by the City pursuant to applicable state and local
11 law. Lockheed Martin hereby reserves all of its rights under
12 state or local law concerning award of any such contract to any
13 person or persons except the "lowest responsible bidder" within
14 the meaning of Burbank Municipal Code § 9-122.

15 J. For operation of the Upstream Facilities, the City of
16 Burbank shall utilize the lowest cost power source available
17 under any of the following options: (1) under ordinances or
18 resolutions of general application adopted by the City, (2)
19 mandated by federal law, or (3) in accordance with Public
20 Utilities Code section 9602 or other applicable state law.
21 Should a separate power generation facility, or any other capital
22 improvement not integral to the Upstream Facilities, be proposed
23 by Lockheed Martin as a capital expenditure under Paragraph K
24 below, the city will consider such a proposal on the same fair
25 and equitable basis as it would treat any similar proposal by any
26 other industrial power consumer in the City. Power for operating
27 the Upstream Facilities, when provided by the City, shall be
28

1 billed by the City of Burbank at the lowest rate then charged by
2 the City for comparable service conditions. As of September 1,
3 1996, "comparable service conditions" for the Upstream Facilities
4 are Rate Class "Industrial" and Rate Code "P." If the City
5 adopts a rate for "comparable service conditions" other than the
6 rate charged by the City to any public or private school, or
7 charged to any user under an agreement entered into in
8 conjunction with a "redevelopment project" pursuant to the
9 California Redevelopment Act, Health & Safety Code § 33000 et
10 seq., which provides power at lower cost than Rate Code "P," the
11 lower rate shall apply to power sold to the Upstream Facilities.

12 K. Lockheed Martin may at any time propose that a capital
13 expenditure be incurred to reduce O&M expenditures with respect
14 to the Upstream Facilities. Any such proposal shall be
15 simultaneously submitted to the Cost Consultant, the City and
16 EPA. Any such proposal shall be limited to facilities that can
17 be fully accommodated within "Area F" (except necessary
18 utilities) as shown on Appendix F to the First Consent Decree.

19 1. Settling Work Defendant shall have no obligation
20 to operate any separate power generation facility. Nor shall
21 Settling Work Defendant have any obligation to operate any
22 capital improvement constructed pursuant to this Paragraph K,
23 where such capital improvement is not integral to the Upstream
24 Facilities. It shall be the obligation of Lockheed Martin to
25 operate any such capital improvement.

26 2. A capital improvement shall be considered to be
27 "integral to the Upstream Facilities" if such capital improvement
28

1 | either (a) would effectively replace a facility or portion of a
2 | facility constructed by Lockheed Martin pursuant to the First
3 | Consent Decree, or (b) would be intrinsically linked to a
4 | facility or portion of a facility constructed by Lockheed Martin
5 | pursuant to the First Consent Decree.

6 | 3. The Cost Consultant shall review the proposal and
7 | any comments submitted by the City and/or the O&M Contractor,
8 | and/or EPA, and determine, based on generally accepted cost
9 | engineering principles, whether the capital expenditure is
10 | economically justified based on the size of the expenditure, the
11 | projected O&M savings and the remaining life of the project. The
12 | Cost Consultant may meet with Lockheed Martin, the City and/or
13 | the O&M Contractor, and/or EPA, with respect to the proposal and
14 | comments thereon.

15 | 4. If the Cost Consultant determines that the capital
16 | expenditure is economically justified, Lockheed Martin may submit
17 | the proposal and a conceptual design of the proposed work to EPA
18 | for approval. The City and/or the O&M Contractor may submit
19 | comments to EPA regarding the proposal and the conceptual design.

20 | 5. EPA shall review the proposal and the conceptual
21 | design, and any comments submitted by the City and/or the O&M
22 | Contractor, and determine based on relevant regulations and
23 | policies (which may include but shall not be limited to the
24 | remedy selection criteria set forth in the National Contingency
25 | Plan), whether the proposed capital expenditure may be
26 | incorporated into the remedy. EPA shall document its decision in
27 | accordance with applicable laws and regulations. EPA may meet
28 |

1 with Lockheed Martin and/or the City and/or the O&M Contractor
2 with respect to the proposal and conceptual design and any
3 comments thereon. Nothing contained in this Paragraph shall be
4 deemed or construed to limit or abrogate in any way the City's
5 exercise of its police powers or EPA's authority under CERCLA.

6 6. If EPA approves the conceptual design, Lockheed
7 Martin shall submit a final design for the proposed work. If EPA
8 approves the final design, Lockheed Martin shall proceed to
9 implement the capital improvement. Lockheed Martin shall be
10 solely responsible for funding and constructing the capital
11 improvement.

12 7. Lockheed Martin shall take reasonable measures to
13 minimize any noise and other disruptions that may be associated
14 with the construction of any capital improvements.

15 8. Lockheed Martin shall defend, indemnify and hold
16 harmless the City of Burbank with respect to actions against the
17 City based upon disturbances related to the installation of
18 capital improvements.

19 L. With the exception of the four extraction wells (VO-1,
20 2, 3 and 4) located at the former Lockheed Martin Plant B-1 in
21 Burbank, California, as depicted in Appendix 8 to this Consent
22 Decree, both the Upstream Facilities and the Downstream
23 Facilities shall be acknowledged by the City as its property for
24 all purposes; provided, however, that any capital improvement
25 constructed pursuant to Paragraph K of this Section that is not
26 integral to the Upstream Facilities, including but not limited to
27 any separate power generation facility, shall not be considered
28

1 or deemed to be the property of the City. Any such capital
2 improvement shall be the property of Lockheed Martin, unless the
3 City or a third party agrees to own the improvement. On or
4 before the Date of Commencement, the UAO Parties, Lockheed Martin
5 and the City shall execute appropriate writings documenting the
6 City's ownership interest in such property. As to the extraction
7 wells located on Lockheed Martin property, there shall be a
8 recorded right of access.

9 M. Commencing from the Date of Commencement, and for a
10 period not to exceed the applicable state statutes of limitations
11 or statutes of repose under which Lockheed Martin may bring such
12 an action against its design contractors less sixty (60) days,
13 the Settling Work Defendant may assert as against Lockheed Martin
14 that any of the Upstream Facilities' failure (if any) to perform
15 as originally designed is due to a Design Defect. Commencing
16 upon the Effective Date of this Consent Decree (as defined in
17 Section XXVIII), and for a period not to exceed the applicable
18 state statutes of limitations or statutes of repose under which
19 the UAO Parties may bring such an action against their design
20 contractors less sixty (60) days, the Settling Work Defendant may
21 assert as against the UAO Parties that the Blending Facility's
22 failure (if any) to perform as originally designed is due to a
23 Design Defect. The Parties agree that the date of substantial
24 completion of the Upstream Facilities was March 1, 1994 and the
25 date of the substantial completion of the Blending Facility was
26 January 6, 1996.

27 1. The Settling Work Defendant, Lockheed, the UAO
28

1 Parties and EPA agree to the following procedures for the
2 resolution of disputes arising from claims that the Upstream
3 Facilities or the Blending Facility have failed to perform as
4 originally designed due to a Design Defect. These disputes may
5 include but are not limited to a determination as to whether or
6 not a failure to perform as originally designed occurred, whether
7 the failure (if any) was due to a Design Defect, the nature,
8 extent and scope of the repair or other work required to cause
9 the facility in question to meet designated operating standards,
10 the reasonableness and necessity of the costs incurred or to be
11 incurred for such work, and the reasonableness, necessity and
12 timeliness of steps taken to address or mitigate such damage
13 claims.

14 a. Upon the occurrence of a facility's failure to
15 perform as originally designed which the Settling Work Defendant
16 alleges to be due, in whole or in part, to a Design Defect in the
17 Upstream Facilities or the Blending Facility:

18 (1) If the alleged occurrence or failure
19 causes or threatens a release of Waste Material from the Site
20 that constitutes an emergency situation or may present an
21 immediate threat to public health or welfare or the environment,
22 the Settling Work Defendant shall take all actions and provide
23 notifications required by Section XVI (Emergency Response). If
24 the alleged occurrence or failure does not come within the
25 provisions of Section XVI (Emergency Response), Settling Work
26 Defendant shall immediately advise the EPA of the alleged
27 occurrence or failure, by telephone or facsimile transmission.
28

1 (2) Settling Work Defendant shall provide a
2 written Notice of Design Defect to EPA within ten (10) days of
3 the date when Settling Work Defendant knew, or reasonably should
4 have known that the alleged occurrence or failure was caused by
5 an alleged Design Defect. The written Notice of Design Defect
6 shall include the basis for the allegation. The Settling Work
7 Defendant shall concurrently provide a copy of the written Notice
8 of Design Defect to either: 1) Lockheed Martin if the alleged
9 Design Defect relates to the Upstream Facilities, or 2) the UAO
10 Parties if the alleged Design Defect relates to the Blending
11 Facility.

12 b. The Settling Work Defendant shall take such
13 steps as EPA directs to commence repairs to the facility, and
14 shall take reasonable steps to mitigate all damages and costs
15 incurred as a result of the alleged Design Defect. Within five
16 (5) days of undertaking such steps, the Settling Work Defendant
17 shall advise EPA and all interested Parties, in writing and by
18 facsimile transmission, of the repairs and steps it has taken or
19 intends to undertake.

20 c. The Parties shall cooperate with one another
21 and immediately make available to each other: all facilities
22 pertaining to the failure and the alleged Design Defect; all
23 records pertaining to the failure and the alleged Design Defect;
24 all records pertaining to the operations and maintenance of the
25 facility including all repair records, all work plans or designs
26 for repair or mitigation of damages; all persons with information
27 about the failure and the alleged Design Defect; and all systems
28

1 that are claimed to be defective. The information to be made
2 available by the UAO Parties and Lockheed Martin shall include
3 but shall not be limited to applicable contracts and
4 correspondence with Lockheed Martin's or the UAO Parties' design
5 contractors, internal documentation relating to the design of the
6 facility with the alleged Design Defect, and "as-builts" of the
7 facility with the alleged Design Defect. The Parties shall make
8 good faith efforts to preserve evidence and information. The
9 Settling Work Defendant's good faith efforts may include but
10 shall not be limited to maintaining a videotape record or log of
11 the status or condition of the facility prior to the performance
12 of repairs or alterations, where practicable.

13 2. Not less than fifteen (15) nor more than thirty
14 (30) days after receipt of the Settling Work Defendant's written
15 Notice of Design Defect, the EPA shall make a Preliminary
16 Finding.

17 a. Lockheed Martin or the UAO Parties may submit
18 a written or oral response to the Settling Work Defendant's
19 allegation within the fifteen (15) days.

20 b. The EPA's Preliminary Finding shall include a
21 preliminary determination as to whether the affected facility or
22 facilities failed to perform as originally designed; whether that
23 failure was, in whole or in part, due to a Design Defect; a
24 preliminary allocation of financial responsibility among the
25 Settling Work Defendant, Lockheed Martin and the UAO Parties; and
26 a preliminary finding as to the reasonableness and necessity of
27 any repairs or other work done or proposed by the Settling Work
28

1 Defendant as a result of the alleged Design Defect.

2 c. According to the preliminary allocation of
3 financial responsibility in the EPA Preliminary Finding, the
4 Settling Work Defendant, Lockheed Martin, and/or the UAO Parties
5 shall finance the work deemed necessary by EPA to cause the
6 affected facility to perform as originally designed, as follows.

7 (1) If EPA determines that the failure was
8 caused, in whole or in part, by a Design Defect in any of the
9 Upstream Facilities, Lockheed Martin shall, within twenty-five
10 (25) days of receipt of the EPA Preliminary Finding, or within
11 twenty-five (25) days of receipt of an itemized statement by the
12 Settling Work Defendant of all repairs or other work performed or
13 to be undertaken as a result of the alleged Design Defect,
14 whichever is later, remit to the Settling Work Defendant the cost
15 of all such work which Lockheed is required to finance pursuant
16 to the preliminary allocation of financial responsibility.

17 (2) If EPA determines that the failure was
18 caused, in whole or in part, by a Design Defect in the Blending
19 Facility, the UAO Parties shall, within twenty-five (25) days of
20 receipt of the EPA Preliminary Finding, or within twenty-five
21 (25) days of receipt of an itemized statement by the Settling
22 Work Defendant of all repairs or other work performed or to be
23 undertaken as a result of the alleged Design Defect, whichever is
24 later, remit to the Settling Work Defendant the cost of all such
25 work which the UAO Parties are required to finance pursuant to
26 the preliminary allocation of financial responsibility. Among
27 the UAO Parties, the obligations of this Paragraph shall be joint
28

1 and several.

2 (3) If EPA determines that the failure of
3 the affected facility was not caused, in whole or in part, by a
4 Design Defect in the Upstream Facilities or the Blending
5 Facility, the Settling Work Defendant and Lockheed Martin shall
6 finance such work as these parties are required to finance
7 pursuant to this Section, Paragraphs A-L.

8 (4) The Settling Work Defendant shall use
9 such funds as are remitted by Lockheed Martin or the UAO Parties
10 pursuant to the Preliminary Finding to pay for work necessary to
11 cause the facility with the alleged Design Defect to perform as
12 originally designed and for no other purpose.

13 (5) The Preliminary Finding may require a
14 party whose facility has been determined to have a Design Defect
15 to provide for advance or ongoing funding of any work necessary
16 to cause the affected facility to perform as originally designed.

17 (6) The Preliminary Finding also may require
18 the Settling Work Defendant to account for expenditures of funds
19 remitted to it under this Paragraph, and to reimburse any party
20 who has remitted such funds if the amount remitted exceeds the
21 expenditures necessary to perform the work necessary to cause the
22 affected facility to perform as originally designed.

23 (7) EPA shall have continuing jurisdiction
24 over the implementation of the Preliminary Finding.

25 d. Subject to EPA's approval, the Settling Work
26 Defendant shall perform such work as is necessary to cause the
27 affected facility to perform as originally designed. EPA may
28

1 require the Settling Work Defendant to submit a schedule and work
2 plan for such work within a specified period of time. Such
3 schedule(s) and work plan(s) shall be submitted, approved and
4 implemented in accordance with Section XII (Submissions Requiring
5 Agency Approval).

6 3. Not less than ninety (90) nor more than one hundred
7 twenty (120) days after receipt of the Settling Work Defendant's
8 Notice of Design Defect, the EPA shall make a further evaluation
9 and issue a Further Determination based upon the following
10 procedure:

11 a. The Settling Work Defendant, Lockheed Martin
12 and/or the UAO Parties, upon receipt of a copy of a Notice of
13 Design Defect pursuant to Paragraph M.1.a.2 of this Section shall
14 have sixty (60) days from receipt of the statement to further
15 inspect the facilities and submit a written statement to EPA.
16 Any such Settling Defendant may request the opportunity to make
17 an oral presentation to the EPA by sending written notice of such
18 intent to EPA and other Settling Defendants who receive a copy of
19 the Notice of Design Defect. EPA shall set a reasonable date,
20 time and location for the presentation. The EPA, in its
21 discretion, may require oral presentations from the affected
22 Settling Defendants.

23 b. If any party submits a written statement as
24 described in Paragraph M.3.a of this Section, EPA shall issue a
25 Further Determination. In the Further Determination, if any, EPA
26 shall determine whether or not a failure to perform as originally
27 designed occurred; whether the failure (if any) was due, in whole
28